Supreme Court, U.S.
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No. 00-853

IN THE

Supreme Court of the United States

CORRECTION OFFICER PORTER, *et al.*,

Petitioners,

v.

RONALD NUSSLE,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Brief of *Amici Curiae* The States of New York, Alaska, Arizona, California, Delaware, Georgia, Hawaii, Illinois, Indiana, Iowa, Kansas, Louisiana, Maryland, Massachusetts, Michigan, Missouri, Nebraska, Nevada, New Jersey, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, Texas, Utah, Vermont, and Washington in Support of Reversal

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The States of New York, Alaska, Arizona, California, Delaware, Georgia, Hawaii, Illinois, Indiana, Iowa, Kansas, Louisiana, Maryland, Massachusetts, Michigan, Missouri, Nebraska, Nevada, New Jersey, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, Texas, Utah, Vermont, and Washington respectfully submit this brief as *amici curiae* urging reversal of the decision below.

STATEMENT OF INTEREST OF *AMICI CURIAE*

The statutory exhaustion requirement at issue in this case mandates exhaustion of administrative remedies in all actions by prisoners "brought with respect to prison conditions." Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, § 803(d), 110 Stat. 1321-66, 1321-71 (1996) ("PLRA"), codified at 42 U.S.C. § 1997e(a). In enacting the PLRA, which expanded the scope of the exhaustion requirement and made exhaustion mandatory, Congress significantly enhanced the ability of *amici* States to use their prison grievance procedures as a tool for safe and effective prison administration, as well as to identify and discourage frivolous prisoner actions.

Prison grievance procedures provide timely feedback to state officials about problems that arise in correctional facilities. They enable administrators at the facilities to take remedial action before isolated instances, taken together, lead to frustration among the prison population or to a pattern of inappropriate conduct by correctional officers, potentially triggering prisoner unrest or disturbances. The grievance procedures also allow state officials to create factual records of any disputes that may eventually be litigated in court, and to filter out meritless inmate claims, thereby reducing the States' costs of defending against frivolous prisoner litigation.

By dramatically curtailing the scope of the exhaustion requirement, the decision below, if not reversed by this Court, will adversely affect the efficacy of *amici* States' prison grievance procedures.

SUMMARY OF THE ARGUMENT

The PLRA's exhaustion requirement applies to an "action . . . brought with respect to prison conditions" under federal law by a prisoner. 42 U.S.C. § 1997e(a). The court below construed this phrase to apply only to systematic practices that affect the prison population as a whole, holding that any inmate alleging excessive force or other misconduct by prison officials that is directed at a particular individual need not exhaust prison grievance procedures pursuant to section 1997e(a).

The Second Circuit's distinction between misconduct affecting particular individuals and practices affecting the prison population as a whole makes little sense in light of the purposes of the exhaustion requirement. In strengthening the exhaustion requirement through enactment of the PLRA, Congress enhanced the states' ability to use administrative grievance procedures to resolve prisoners' grievances, reduce frivolous litigation, and develop the factual record for future litigation. Exhaustion serves these purposes regardless of whether a prisoner's grievance concerns an isolated instance of alleged misconduct by a prison official or a prison's systematic practice. Indeed, interpreting section 1997e(a) to permit prisoners to immediately litigate in court any action alleging individualized misconduct without first exhausting administrative grievance procedures would significantly deny the benefits afforded to *amici* States by the PLRA.

Nor do the statute's text and legislative history provide any support for the narrow reading adopted by the Second Circuit. The phrase "action . . . brought with respect to prison conditions," construed in its most natural manner, does not exclude prisoner claims of individualized misconduct by correctional officials. Moreover, two other subsections of section 1997e confirm that this phrase should be read broadly.

Those provisions (sections 1997e(c) and 1997e(f)) permit sua sponte dismissal of frivolous actions and direct that pretrial proceedings shall be conducted via telecommunications technology without removing the inmate from his correctional facility. Prohibiting courts and parties from exercising these options in all prisoner actions alleging individualized conduct by a prison official — for example, an allegation that a guard improperly denied an inmate access to recreation time on a specific date — would make no sense. The PLRA's legislative history also supports a broad construction of the exhaustion requirement. It demonstrates that in enacting section 1997e(a), Congress intended to broaden the scope of the exhaustion requirement to cover *Bivens* actions brought by federal prisoners, not to narrow its applicability as suggested by the court below.

ARGUMENT

I. The Second Circuit's Interpretation of Section 1997e(a) Undermines Congress' Purposes in Requiring Exhaustion

The exhaustion requirement at issue in this case, as amended by the PLRA, provides:

> No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.

42 U.S.C. § 1997e(a).

The Second Circuit below held that the phrase "action . . . brought with respect to prison conditions," which delineates the scope of section 1997e(a), "does not encompass [actions alleging] particular instances of excessive force or assault." *Nussle v. Willette*, 224 F.3d 95, 100 (2d Cir. 2000). Relying upon the dictionary definition of the word "conditions" — which, according to the court,

"denotes 'attendant circumstances' or an 'existing state of affairs' " — the Second Circuit concluded that "the use of the term 'prison conditions' in § 1997e(a) would appear to refer to 'circumstances affecting everyone in the area affected by them,' rather than 'single or momentary matters,' such as beatings or assaults, that are directed at particular individuals." *Id.* at 101 (internal quotation marks omitted). The Second Circuit also found support for its interpretation in another provision of the PLRA, 18 U.S.C. § 3626, which uses the phrase "civil action with respect to prison conditions" in limiting the type of relief that inmates may obtain in court.

In a series of cases following *Nussle*, the Second Circuit has made clear that its interpretation of the phrase "action . . . brought with respect to prison conditions" excludes not only claims of excessive force or assault but all claims alleging particularized instances of misconduct. *See Lawrence v. Goord*, 238 F.3d 182, 185 (2d Cir. 2001) (permitting unexhausted claims in prisoner actions alleging "particularized instances of retaliatory conduct directed against an inmate"), *petition for cert. filed*, 69 U.S.L.W. 3702 (U.S. Apr. 17, 2001) (No. 00-1619); *accord Giano v. Goord*, 250 F.3d 146, 150 (2d Cir. 2001); *see also Marvin v. Goord*, No. 99-0279, 2001 U.S. App. LEXIS 13586, at *5 (2d Cir. June 19, 2001) (vacating dismissal of unexhausted claims of denial of access to legal mail, violation of freedom of religion, and deliberate indifference to serious medical needs, and remanding for re-examination in light of *Nussle* and *Lawrence*); *Royster v. United States*, No. 00-0185, 2001 U.S. App. LEXIS 7249 (2d Cir. April 16, 2001) (vacating dismissal of claim of denial of access to legal documents and remanding for reconsideration in light of *Nussle* and *Lawrence*).

Indeed, recent Second Circuit decisions have characterized *Nussle* and its progeny as requiring exhaustion of prison grievance procedures pursuant to section 1997e(a)

only if the challenged conduct on the part of correctional employees "was either clearly mandated by a prison policy or undertaken pursuant to a systematic practice." *Marvin*, 2001 U.S. App. LEXIS 13586, at *5; *see also Royster*, 2001 U.S. App. LEXIS 7249, at *5.[1] Thus, application of the exhaustion requirement has apparently become the exception, rather than the rule.

By narrowly construing section 1997e(a), the Second Circuit has severely undermined the purposes of the exhaustion requirement. Exhaustion of administrative grievance procedures has several benefits: the opportunity for an agency to correct its own mistakes in a timely manner, the filtering out of frivolous claims, and the development of a record for further litigation. Congress' decision in amending section 1997e(a) to expand the scope of the exhaustion requirement and make it mandatory furthers each of these goals.

First, administrative grievance procedures allow states to fairly and efficiently resolve prisoner grievances. When a prisoner's complaint has merit, the prison has an "opportunity to correct its own mistakes." *McCarthy v. Madigan*, 503 U.S. 140, 146 (1992); *see also McGee v. United States*, 402 U.S. 479, 484 (1971) ("[A] strict exhaustion requirement tends to ensure that the agency had additional opportunities to discover and correct its own errors, and thus may help obviate all occasion for judicial review." (internal quotation marks omitted)); *McKart v. United States*, 395 U.S. 185, 195 (1969) ("A complaining party may be successful in vindicating his rights in the administrative process. If he is required to pursue his administrative remedies, the courts may never have to intervene."). "In fact, the administrative process may make

1. The Second Circuit has left open even "the question of whether exhaustion is required if the challenged conduct is undertaken pursuant to a prison policy which vests discretion in correctional employees to act or not act." *Marvin*, 2001 U.S. App. LEXIS 13586, at *5 n.2.

negotiation more effective and may serve to reduce the scope of litigation should some, if not all, of the inmate's grievances be resolved internally." *Smith v. Zachary*, No. 99-4084, 2001 U.S. App. LEXIS 14339, at *10 (7th Cir. June 28, 2001).

This opportunity for early identification of grievances is particularly critical in correctional facilities, where a quick resolution of problems reduces the likelihood of prisoner unrest. *See id.* ("Requiring prompt notice and exhaustion also gives prison officials an opportunity to address a situation internally, which in a case like this could involve relocating [a guard], firing guards, hiring new ones, or providing additional training and supervision to staff.") (citation omitted).

The need for such notice is no less for claims of individualized misconduct than for claims regarding prison-wide practices. In New York, for example, the Department of Corrections uses prisoner grievance data — much of which involves claims of alleged misconduct directed at a specific inmate — to identify and address problems at particular facilities or system-wide. Those problems may be the result of activities that are, in fact, contrary to law or prison policy, or simply routine practices that are a source of irritation to inmates and may eventually escalate into prison unrest. *See* State of New York Department of Correctional Services, *Inmate Grievance Program: Annual Report* (2000); *see also Freeman v. Francis*, 196 F.3d 641, 644 (6th Cir. 1999) ("Prisons need to know about and address claims of excessive force as they would any other claim concerning prison life so that steps may be taken to stop problems immediately if they exist.")

Second, the exhaustion requirement enables the administrative grievance process itself to filter out some frivolous claims. *See* 141 Cong. Rec. S14414 (daily ed. Sept. 27, 1995) (statement of Senator Dole) (referring to exhaustion requirement as one of several PLRA provisions that "would go a long way to take

the frivolity out of frivolous inmate litigation"); *id.* S14626 (daily ed. Sept. 29, 1995) (similar statement). For example, upon review and rejection of their frivolous claims by an administrative body, some prisoners will not proceed further simply because they received an opportunity to voice their complaints. Other prisoners may not file a civil action in court based on grievances rejected as frivolous for fear of losing in forma pauperis status for other complaints with more merit. *See* 28 U.S.C. § 1915(g). By reducing the number of frivolous claims that ultimately reach the courts, the PLRA's enhanced exhaustion requirement lowers the enormous costs the States must bear when prisoners litigate their grievances. *See id.* S14413 (daily ed. Sept. 27, 1995) (statement of Senator Dole) ("The National Association of Attorneys General estimates that inmate civil rights litigation costs the States more than $81 million each year. Of course, most of these costs are incurred defending lawsuits that have no merit whatsoever.").

In outlining the types of actions that might be deemed frivolous, Congress did not adopt the Second Circuit's distinction between claims affecting the prison population as a whole and individualized claims of misconduct. In fact, Senator Dole's explanation of the type of prisoner actions that motivated the PLRA clearly *includes* individualized claims:

> According to Enterprise Institute scholar Walter Berns, the number of "due-process and cruel and unusual punishment" complaints filed by prisoners has grown astronomically — from 6,600 in 1975 to more than 39,000 in 1994. These suits can involve such grievances as insufficient storage locker space, a defective haircut by a prison barber, the failure of prison officials to invite a prisoner to a pizza party for a departing prison

> employee, and yes, being served chunky peanut butter instead of the creamy variety.

141 Cong. Rec. S14413 (daily ed. Sept. 27, 1995) (introducing S. 1279)[2]; *see also id.* at S14418 (statement by co-sponsor Senator Hatch) ("The crushing burden of these frivolous suits makes it difficult for courts to consider meritorious claims. In one frivolous case in Utah, an inmate sued demanding that he be issued Reebok or L.A. Gear brand shoes instead of the Converse brand being issued. In another case, an inmate deliberately flooded his cell, and then sued the officers who cleaned up the mess because they got his Pinochle cards wet."); *id.* (statement by co-sponsor Senator Kyl) (referring to prisoner lawsuits filed "in response to almost any perceived slight or inconvenience," including "being denied the use of a Gameboy video game").

As is evident from these examples, the types of frivolous prisoner lawsuits contemplated by Congress were hardly limited to lawsuits challenging prison policies or systematic practices. Excluding all other claims from the scope of the exhaustion requirement would significantly diminish the cost-savings that Congress anticipated in enacting section 1997e(a).

Third, "even where a controversy survives administrative review, exhaustion of the administrative procedure may produce a useful record for subsequent judicial consideration." *Madigan*, 503 U.S. at 146; *see also*

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2. The PLRA amendment of section 1997e(a) was introduced in the Senate, *see* Prison Litigation Reform Act of 1995, S. 1279, 104 Cong. § 3 (1995); 141 Cong. Rec. S14413 (daily ed. Sept. 27, 1995), and subsequently included in H.R. 2076, an appropriation bill, *see* H.R. Conf. Rep. No. 104-378, at 166-67 (1995), that the President vetoed, *see* 141 Cong. Rec. H15166-15167 (daily ed. Dec. 19, 1995). That provision, along with the rest of the PLRA, was then inserted into H.R. 3019, a revised budget appropriation bill, *see* H.R. Conf. Rep. No. 104-537, at 68-80 (1996), which ultimately became law, *see* Pub. L. No. 104-134, 110 Stat. 1321-66 (1996).

Weinberger v. Salfi, 422 U.S. 749, 765 (1975); *McKart*, 395 U.S. at 194. Even where a state administrative process does not involve formal fact-finding, the "paperwork generated by the grievance process might assist a court somewhat in ascertaining the facts underlying a prisoner's claim more quickly than if it has only a prisoner's complaint to review." *Madigan*, 503 U.S. at 155.

Congress amended the exhaustion requirement in part because it believed that the administrative grievance process would "foster better-prepared litigation once a dispute did move to the courtroom, even absent formal fact-finding." *Booth v. Churner*, 121 S. Ct. 1819, 1823 (2001); *see also Smith*, 2001 U.S. App. LEXIS 14339, at *12-13 ("The [PLRA's exhaustion] requirement is not designed to stop prisoners from filing suits, but rather to facilitate the litigation process. In particular, the development of the factual record may help rather than hinder prisoners, enabling them to succinctly present their cases."); 141 Cong. Rec. H14105 (daily ed. Dec. 6, 1995) (statement of Rep. LoBiondo) (explaining that "new administrative exhaustion language" in H.R. 2076 "will provide some degree of fact-finding so that when or if the matter reaches Federal court there will be a record upon which to proceed in a more efficient manner"). That purpose is served whether the dispute at issue concerns systematic practices or individualized instances of misconduct.

In light of the purposes advanced by the exhaustion requirement, the distinctions in the Second Circuit's interpretation of section 1997e(a) are illogical. Administrative grievance procedures can resolve some grievances, filter out frivolous complaints, and produce a more developed factual record for future litigation, *regardless* of whether prisoners bring claims of excessive force, assault, or other individualized misconduct, or bring claims referring to "circumstances affecting everyone in the area affected by them." *Nussle*, 224 F.3d at 101 (internal quotation marks omitted). Nor are

administrative grievance procedures any less effective where the challenged conduct was *ultra vires*, as opposed to conduct mandated by prison policy. Indeed, administrative grievance procedures may be particularly important where the challenged conduct violates the clear mandates of prison policy, because meritorious grievances may alert prison administrators to problems that call for especially prompt action.

II. Section 1997e(a) Does Not Exclude Claims of Excessive Force or Other Isolated Episodes of Misconduct

A. The Text of Section 1997e(a) and Other Subsections of the Same Provision Support a Broad Construction of the Exhaustion Requirement.

The text of section 1997e(a), which mandates exhaustion in any "action . . . brought with respect to prison conditions," does not, on its face, admit of any exclusions. The Second Circuit's interpretation of this provision to exclude actions alleging excessive force, retaliatory conduct, and any other singular episode of misconduct directed at a particular inmate thus lacks foundation in the language of the statute itself.

Two other subsections of the same section 1997e confirm that the phrase "action . . . brought with respect to prison conditions" in subsection 1997e(a) should not be read to exclude claims of particularized misconduct. Subsection (c) of 1997e permits a district court to dismiss sua sponte "any action brought with respect to prison conditions" if it determines that the action is frivolous. 42 U.S.C. § 1997e(c)(1). Subsection (f) of 1997e provides that pretrial proceedings in "any action brought with respect to prison conditions" shall be held at the prison via telephone, video conference, or other telecommunications technology so that an inmate need not be physically transferred to participate. *Id.* § 1997e(f)(1).

Notwithstanding the Second Circuit's reliance on the dictionary definition of the word "conditions," *see Nussle*, 224 F.3d at 101, it is not plausible that Congress intended to exclude any action alleging particularized misconduct from the scope of these procedural provisions. It is counterintuitive and illogical to suggest that Congress would permit sua sponte dismissal of frivolous actions alleging conduct affecting the entire prison population (such as prison overcrowding), but not of frivolous actions alleging assault or excessive force. Similarly, there is no reason why Congress would require that a prisoner participate in pre-trial proceedings via telecommunications technology — thereby reducing the burden associated with physically transferring that prisoner for the proceeding — but hinge the application of that requirement on what acts the prisoner chooses to challenge in his complaint. Because the phrase "action . . . brought with respect to prison conditions" should be given a consistent meaning throughout the section, *see Commissioner of Internal Revenue v. Keystone Consolidated Industries, Inc.*, 508 U.S. 152, 159 (1993), this Court should not construe Congress' use of that phrase in section 1997e(a) as evincing its intent to exclude claims involving non-systematic episodes of misconduct.

B. In Amending the Exhaustion Requirement Through the PLRA, Congress Intended to Expand, Not Restrict, Its Scope.

The legislative history of the PLRA indicates that in amending the pre-existing exhaustion requirement, Congress intended only to remedy this Court's prior decision confining the scope of section 1997e(a) to section 1983 cases, not to limit its applicability in the manner suggested by the Second Circuit.

Before the PLRA's enactment in 1996, the exhaustion requirement of section 1997e(a) covered "any action brought pursuant to section 1983 of this title [*i.e.*, 42 U.S.C. § 1983] by an adult convicted of a crime confined in any jail, prison,

or other correctional facility." 42 U.S.C. § 1997e(a)(1) (1994). Section 1983 itself permitted a prisoner to challenge "the conditions of his prison life," but not the fact or duration of the confinement itself. *Preiser v. Rodriguez*, 411 U.S. 475, 499 (1973).

Subsequently, this Court held in *McCarthy v. Madigan*, 503 U.S. 140 (1992), that this exhaustion requirement did not apply to actions brought by prisoners against the United States pursuant to *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971). *See Madigan*, 503 U.S. at 150. The Court explained that it was "significant that Congress, in enacting § 1997e, stopped short of imposing a parallel requirement in the federal prison context." *Id.* As a result, inmates confined in federal prisons (who would appropriately bring a *Bivens* action rather than a section 1983 suit to challenge an aspect of their prison conditions), were not subject to the exhaustion requirement.

The PLRA's legislative history demonstrates that in amending section 1997e(a), Congress sought to remedy the effects of *McCarthy* by mandating exhaustion for *Bivens* actions brought by inmates in federal prisons. As Representative LoBiondo explained:

> The real problem with [*Bivens*] cases came with the Court's decision in 1992 that an inmate need not exhaust the administrative remedies available prior to proceeding with a Bivens actions for money damages only. *McCarthy v. Madigan*, 112 S.Ct. 1081 (1992). This decision was made without the benefit of any legislative guidance and the Court made that point very clearly in its opinion, almost to the point of asking that Congress do something.
>
> . . .

> I am pleased to say that I have worked with the conferees of H.R. 2076 to ensure that the prison litigation reform measures address the Bivens issue. The new administrative exhaustion language in H.R. 2076 will require that all cases brought by Federal inmates contesting any aspect of their incarceration be submitted to administrative remedy process before proceeding to court.

141 Cong. Rec. H14105 (daily ed. Dec. 6, 1995). By adding to section 1997e(a) the phrase "any other Federal law," Congress intended to statutorily override *Madigan* and to extend section 1997e(a) to cover federal prisoners' actions under *Bivens*.

By also amending section 1997e(a) to cover only those actions "brought with respect to prison conditions," Congress intended to ensure that claims which arise wholly outside the prison context — but are nonetheless brought by a prisoner — are not subject to the exhaustion requirement. Absent this additional clarifying language, the new phrase "any other Federal law," when combined with Congress' decision to make exhaustion mandatory, would have meant that a prisoner who brought an action under federal law concerning injuries that occurred *prior* to his incarceration — such as an action alleging violation of federal employment discrimination law or misconduct by the arresting police officer[3] — would be required to exhaust prison administrative

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3. According to one study of section 1983 prisoner lawsuits disposed of in 1992 by federal district courts in nine states, six percent of the lawsuits named arresting officers as defendants. *See* Roger A. Hanson & Henry W.K. Daley, United States Department of Justice, *Challenging the Conditions of Prisons & Jails: A Report on Section 1983 Litigation* 16 (1994); *see also id.* at 17 tbl.3 (3% of prisoner actions under section 1983 raise the issue of assault by the arresting officer). "Other types of (Cont'd)

grievance procedures, even though those procedures are obviously ill-suited to resolve such claims. By adding the phrase "with respect to prison conditions," Congress made certain that such non-prison related actions would not be subject to the exhaustion requirement.

C. Section 3626 of the PLRA Confirms that the PLRA's Exhaustion Requirement Covers Particularized Episodes of Misconduct

Section 3626 of the PLRA, which restricts the authority of federal courts to order equitable relief in prisoner actions, also uses the phrase "any civil action with respect to prison conditions." Congress defined that phrase to mean

> any civil proceeding arising under Federal law with respect to the conditions of confinement or the effects of actions by government officials on the lives of persons confined in prison, but does not include habeas corpus proceedings challenging the fact or duration of confinement in prison.

18 U.S.C. § 3626(g)(2).

The Second Circuit relied on section 3626(g)(2) to support its cramped interpretation of section 1997e(a), concluding that if the two provisions can be read *in pari materia*, the definition set forth in section 3626(g)(2) does not encompass particular instances of excessive force, assault, or other misconduct directed at a particular inmate. *See Nussle*, 224 F.3d at 101-105; *see also Lawrence*, 238 F.3d at 185 ("*Nussle* read § 1997e(a) *in pari materia* with another section of the PLRA, 18 U.S.C. § 3626(g)(2). . . .").

(Cont'd)

defendants include clerks of the court, court reporters, privately retained and court appointed state trial and appellate counsel, spouses, private business persons, and the President of the United States (29%)." *Id.* at 16.

In the first place, it is not clear that section 3626(g)(2) may properly be construed *in pari materia* with section 1997e(a). Because section 3626(g) expressly limits the applicability of the definitions provided therein to terms "[a]s used in this section," 18 U.S.C. § 3626(g), Congress may not have intended to apply section 3626(g)(2)'s definition of "civil action with respect to prison conditions" to other sections of the PLRA. *See, e.g., Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 784-784 & n.13 (2000) (indicating that 31 U.S.C. § 3733(l)(4), which expressly defines " 'person,' '[f]or purposes of this section,' to include States," "is explicitly made inapplicable" to 31 U.S.C. § 3729 and other sections of the False Claims Act containing the term "person").

If section 3626(g)(2) is nonetheless relevant in construing section 1997e(a), it supports a broad reading of the exhaustion requirement contained in the latter provision because, contrary to the analysis by the court below, claims regarding excessive force or other particularized episodes of misconduct readily fit into either prong of section 3626(g)(2), which defines actions with respect to prison conditions as actions with respect to (1) "the conditions of confinement," or (2) "the effects of actions by government officials on the lives of persons confined in prison." 18 U.S.C. § 3626(g)(2).

Although the Second Circuit found that characterizing the use of excessive force as "conditions of confinement" "clearly departs from normal, everyday use of the phrase," *Nussle*, 224 F.3d at 102, this Court has construed the term "conditions of confinement" in a similar context to include such claims. *See McCarthy v. Bronson*, 500 U.S. 136, 137, 143-44 (1991) (holding that the statutory phrase "conditions of confinement," which delineated scope of statute authorizing referral to magistrates of prisoner petitions, embraced both "a specific episode of unconstitutional conduct by prison administrators" as well as "challenges to ongoing prison conditions"); *see also Wilson v. Seiter*, 501

U.S. 294, 299 n.1 (1991) (rejecting the distinction between specific acts and conditions of confinement as impractical). Since repetition in a new statute of language previously construed by the courts "indicates, as a general matter, the intent to incorporate [the former statute's] . . . judicial interpretations as well," *Bragdon v. Abbott*, 524 U.S. 624, 645 (1998), the phrase "conditions of confinement," as used in the PLRA, is appropriately construed as consistent with *Bronson*'s interpretation of the same phrase.

The second category of actions included in section 3626(g)(2), "the effects of actions by government officials on the lives of persons confined in prison" is also easily construed to include "isolated episodes of unconstitutional conduct at the hands of prison officials," including claims of excessive force. *Booth v. Churner*, 206 F.3d 289, 296 (3d Cir. 2000), *aff'd on other grounds*, 121 S. Ct. 1819 (2001). The Second Circuit found it significant that "such awkward language would not, ordinarily, be used to describe such incidents." *Nussle*, 224 F.3d at 102. And indeed, had Congress intended to cover *only* particular instances of assault or excessive force, it is more likely to have used more specific language, such as the words "excessive force" or "assault." The broad nature of the phrase, however, coupled with Congress' failure to enumerate specific kinds of conduct, indicates that Congress intended to cover a *wide variety* of official actions that affect prisoners, including, but not limited to, excessive force and assault.

In analyzing this second prong of section 3626(g)(2), the Second Circuit also concluded that the primary purpose of section 3626 — to prevent federal courts from micromanaging prison systems — suggests that the term "government officials" in section 3626(g)(2) covers only "administrative and policymaking officials." *Nussle*, 224 F.3d at 104. But Congress knows how to specify a particular subset of government officials. *See, e.g.*, 12 U.S.C. § 3410(d) ("supervisory official of the Government authority");

18 U.S.C. § 202(a) (definition of "special Government employee"); 50 U.S.C. app. § 2160(b)(3) ("full-time salaried Government officials who are responsible for making policy decisions"). Its failure to so specify in section 3626(g)(2) indicates that it did not intend to do so. *See also Smith*, 2001 U.S. App. LEXIS 14339, at *6 ("Smith argues that the designation 'government official' does not apply to prison guards, but rather refers only to 'senior policy-making and administrative officials.' We find no basis for adding these qualifiers to the plain language of the statute.").

Nor is there any reason to conclude that, in light of section 3626's purpose, the term "civil action with respect to prison conditions" as used in that section refers only to actions "affecting large numbers of inmates." *Nussle*, 224 F.3d at 106. Section 3626 covers various kinds of equitable relief, including "[p]rospective relief in any civil action with respect to prison conditions" brought by "a particular plaintiff or plaintiffs," 18 U.S.C. § 3626(a)(1)(A). Although Congress did limit the relief available under section 3626 to cases involving large numbers of inmates in other instances, *see id.* § 3626(a)(3)(E)(i) (authorizing entry of prisoner release order only if "crowding is the primary cause of the violation of a Federal right"), it defined "prospective relief" broadly to mean "all relief other than compensatory monetary damages," *id.* § 3626(g)(7). Contrary to the Second Circuit's reasoning, this definition certainly covers a federal action brought by a prisoner who alleges a single incident of misconduct at the hands of particular prison officials and seeks *individualized* equitable relief, such as a transfer to a different correctional facility or assignment to a particular prison program.[4]

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4. The Second Circuit in *Nussle* also justified its interpretation of section 1997e(a) by relying on pre-PLRA decisions of this Court concerning the Cruel and Unusual Punishment Clause of the Eighth Amendment that "distinguish between 'excessive force' claims, on the one hand, and 'conditions of confinement' claims, on the other."

(Cont'd)

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the Second Circuit Court of Appeals.

(Cont'd)
Nussle, 224 F.3d at 106 (citing *Hudson v. McMillian*, 503 U.S. 1, 9 (1992) and *Farmer v. Brennan*, 511 U.S. 825, 835-36 (1994)). Those decisions, however, do not apply in this context and thus do not support the Second Circuit's interpretation.

In *Hudson*, the Court held that the malicious use of excessive physical force against a prisoner can constitute cruel and unusual punishment even when the inmate does not suffer significant injury. The Court distinguished this feature of Eighth Amendment excessive-force claims from the fact that "extreme deprivations are required to make out a conditions-of-confinement claim" under the Eighth Amendment, *id.* at 9, motivated *solely* by the fact that contemporary standards of decency — the constitutional benchmark for analyzing what constitutes cruel and unusual punishment under the Eighth Amendment — required the Court to make this distinction, *see id.* at 11; *see also Farmer*, 511 U.S. at 835-36 (reaffirming this distinction). Because nothing in the text or legislative history of the PLRA indicates that Congress intended to import the substantive standards governing cruel and unusual punishment claims into section 1997e(a), *Hudson* and *Farmer* deserve no weight in determining the meaning of "action . . . with respect to prison conditions" in that provision.

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